



Kentucky Law Journal

Volume 86 | Issue 1

Article 6

1997

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Recommended Citation

Johnson, David E. (1997) "Taking a Second Look at the Second Amendment and Modern Gun Control Laws," *Kentucky Law Journal*: Vol. 86 : Iss. 1 , Article 6.
Available at: <https://uknowledge.uky.edu/klj/vol86/iss1/6>

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Taking a Second Look at the Second Amendment and Modern Gun Control Laws

BY DAVID E. JOHNSON*

INTRODUCTION

The "Great American Gun War"¹ rages hotter than ever. Advocates of gun control decry the excesses of the "gun culture," which is thought to be unique to the United States,² and regularly cite high rates of violent crime that they say are directly attributable to the widespread sale and ownership of firearms.³ Opponents of efforts to regulate gun ownership, represented mainly by the National Rifle Association, point to the Second Amendment⁴ as a source

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¹ B. Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST 37 (1976), noted in Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 206 (1983).

² In Great Britain, for example, where 3500 gun-related crimes in one year (as compared to over a million such crimes annually in the United States) are considered to constitute a "crime wave," many view the American "gun culture" as an anomaly, rather than the norm. The British Parliament recently took steps toward a very broad ban on private possession of any kind of handguns, by passing a law which requires handgun owners to participate in a government buy-back program. See Otis Pike, *Targeting Guns*, THE TIMES-PICAYUNE (New Orleans), June 16, 1997, at B5; John Deane, *Handgun Ban Outlined in New Bill*, PRESS ASSOCIATION NEWSFILE, May 22, 1997, available in LEXIS, News Library, CURNWS file.

³ See, e.g., Government Policies Associated with the Second Amendment: Hearings Before the Subcomm. on Crime of the House of Representatives, 103d Cong., 1st Sess., at 1 (1993) (statement of Edward E. Kallgren), cited in Brannon P. Denning, *Can the Simple Cite Be Trusted? Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 964 (1996).

⁴ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

of absolute and inviolable protection of their right to keep and bear arms.⁵

The modern debate focuses on trying to determine the correct interpretation of the Second Amendment. Two main schools of thought have dominated recent discourse and scholarship on the issue, each with its own conclusions about what the Second Amendment really means. They are the "states' rights," or "collective rights," school and the "individual rights" school. The gun control proponents who constitute the former group cite the opening phrase of the amendment, along with subsequent case law, as clear authority that the right was to extend only so far as necessary for the several states to establish and maintain militias, and in no way creates or protects an individual right to own arms.⁶ In light of changes in the political climate over the last two centuries and the rise of National Guard organizations in each state, these people argue that the Second Amendment is an anachronism, and that there is no longer a need to protect any right to private gun ownership. Those on the opposite side of the question, supporting what has become known as the "Standard Model,"⁷ argue that the amendment protects an individual right inherent in the concept of ordered liberty, and they tend to resist any attempt to circumscribe such a right.

Upon close analysis, the Second Amendment's language, particularly when viewed in light of the historical context in which it was drafted, seems to strongly support the interpretation offered by the "individual rights" school. The plain language of the Supreme Court's opinion in *United States v. Miller*⁸ appears to bolster the argument that the Framers, by drafting the amendment, intended to protect an already existing

⁵ See Joan Biskupic, *NRA, Gun-Control Supporters Take Aim at Swing Vote*, 49 CONG. Q. 604, 607 (1991).

⁶ See, e.g., Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995). For a comprehensive rebuttal to the arguments of Herz and other authors who support the states' rights interpretation, see Randy E. Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996).

⁷ For a detailed discussion of the "Standard Model," see Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 464-88 (1995). For additional discussion of the history of the Second Amendment that parallels the arguments of "Standard Model" proponents, see Robert Dowd, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25 (1997).

⁸ *United States v. Miller*, 307 U.S. 174 (1939).

individual right, rather than create a new one. If this is a valid interpretation of the Second Amendment and related case law, it then becomes important to consider how this affects the interplay between the private right to own firearms and the states' police power in the area of firearms regulation. This Note will offer evidence tending to show that the individual rights interpretation is in fact the correct one.⁹ When this conclusion has been satisfactorily established, the discussion will turn to applying the amendment's proscription against infringement of the right to keep and bear arms to more recent gun control statutes, particularly the Brady Bill¹⁰ and the 1994 ban on assault weapons.¹¹ The final analysis yields some results which are sure to be controversial.¹²

II. A SECOND LOOK AT THE ORIGINS OF THE SECOND AMENDMENT

To establish a credible and defensible position in the Second Amendment debate, whether for or against gun control, it is absolutely essential to properly understand the language of the amendment and the history surrounding its adoption.¹³ Obviously, the wording of the amendment will be the starting point in any attempt at construction, and the historical context will show the political climate that created the need for such a provision in the first place. More importantly, this information provides valuable insight into the intent of the Framers, particularly with

⁹ See *infra* Parts II and III.

¹⁰ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 18 U.S.C. § 922(s)-(t) (1995)). The United States Supreme Court, in *Printz v. United States*, 117 S. Ct. 2365 (1997), held § 922(s)(2) unconstitutional as violative of the principles of federalism, yet severable from the Act. As a result, background checks on prospective handgun purchasers conducted by the chief law enforcement officer ("CLEO") of each local jurisdiction are no longer mandatory. Instead, these checks are now performed on a voluntary basis by the CLEOs. See generally Roger K. Lowe, *High Court Shoots Down Key Section of Brady Law*, THE COLUMBUS DISPATCH, June 28, 1997; *Gun Law's Checks Barred*, THE NEWS & OBSERVER (Raleigh, N.C.), June 28, 1997, at A1. See *infra* notes 111-23 and accompanying text.

¹¹ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (codified as amended at 18 U.S.C. § 922 (v) (1995)). See *infra* notes 124-38 and accompanying text.

¹² See *infra* notes 139-41 and accompanying text.

¹³ For a detailed history of the adoption of the Second Amendment, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984).

regard to controversial words like "militia" and "the people." When the modern analyst is equipped with this understanding, it becomes clear that the "individual rights" interpretation of the Second Amendment is the more persuasive.¹⁴

A. The Plain Language of the Second Amendment

If we, two hundred years after the fact, are to understand the intent behind the drafting of the Second Amendment, a good place to start is with the language of the amendment itself. By carefully examining the individual words and phrases, and giving the Framers credit for having chosen the wording of the amendment with such care as befits its constitutional significance, the analyst will discover that the whole is actually about equal to the sum of its parts. The key segments to consider are the opening clause and the words "militia" and "people."

1. A Quick Grammar Refresher

One key to understanding the substance of the Second Amendment lies in its grammatical and syntactic structure. Note that there are two distinct clauses within the sentence, one independent, and one subordinate. "[T]he right of the people to keep and bear Arms, shall not be infringed,"¹⁵ standing alone, would state unequivocally that the right is individual in nature, and would leave no room for reasonable dispute. However, that tricky phrase, "A well regulated Militia, being necessary to the security of a free State,"¹⁶ seems upon first reading to disturb that understanding.

Notice, however, the function of this subordinate clause. Collective rights adherents would argue that it qualifies the rest of the amendment by placing a limitation on the people's right or a condition precedent on the existence of the right. If the clause read "To the extent a well regulated Militia is necessary" this argument might be plausible. However, no such language exists, nor is it implicit in the rest of the amendment or in its historical context.¹⁷ Reliance on such an interpreta-

¹⁴ After a detailed analysis of Second Amendment scholarship, history, and case law, Professor Reynolds, likewise, came to the conclusion that the Second Amendment more readily supports an "individual rights" interpretation. See Reynolds, *supra* note 7

¹⁵ U.S. CONST. amend. II.

¹⁶ *Id.*

¹⁷ See *id.*

tion of the subordinate clause would therefore seem unreasonable. The plain language of the amendment, without regard for attenuated inferences therefrom, shows that the function of the subordinate clause is not to qualify the right, but rather to explain why the right must be protected. The right exists independent of the existence of the militia, but because of the need for the militia in preserving the security of a free state, the people's right must be protected. If this right were not protected, the existence of the militia, and consequently the security of the state, would be jeopardized.

2. *The Meaning of "Militia"*

This brings us to the question of what exactly is the "militia." Gun control advocates emphasize the opening clause of the Second Amendment to establish their position that the protected right belongs to the states for the purpose of forming militias (read National Guard units or analogous formations¹⁸), rather than to individuals for the purpose of protecting private ownership of firearms.¹⁹ "A well regulated Militia, being necessary to the security of a free State," seems fairly self-explanatory on the surface. However, a superficial analysis often will produce a misleading conclusion, and it does so here. A common argument is that this phrase responds to the constitutional authority of Congress "[t]o provide for organizing, arming and disciplining, the Militia."²⁰ The problem with this analysis, however, is that it disregards the clear meaning of the term "militia" as it was understood at the time the clause was drafted.

In eighteenth century America, the militia was understood to encompass the whole of the free citizenry²¹ The colonists, and later the independent United States, followed the then-current English practice of permitting free citizens to keep arms for both military and law enforce-

¹⁸ Reynolds, *supra* note 7, at 475-78.

¹⁹ See generally Herz, *supra* note 6.

²⁰ U.S. CONST. art. I, § 8, cl. 15.

²¹ "Who are the militia? They consist now of the whole people" Reynolds, *supra* note 7, at 473, quoting George Mason, *Virginia Debates on the Adoption of the Federal Constitution*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 425 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1836).

ment purposes.²² It was the duty of average citizens both to repel foreign invaders and to provide their own crime control.²³ “The ‘militia’ was the entire adult male citizenry, who were not simply *allowed* to keep their own arms, but affirmatively *required* to do so.”²⁴ Richard Henry Lee²⁵ also described the militia broadly, and was careful to distinguish it from a select militia or standing army of regular troops:

“A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary. [T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.”²⁶

It is clear from the distinctions drawn by Lee that there is no merit to the argument that the modern National Guard is the “militia” that was visualized by the Framers. Rather, the National Guard formations of today fit the category of “select corps of militia, or distinct bodies of military men” as opposed to the “general militia.”²⁷ References to the former type of unit were “strongly pejorative,”²⁸ while the latter was seen as the guardian of liberty.²⁹ The distinction likewise was implied by

²² See Kates, *supra* note 1, at 214.

²³ See *id.*

²⁴ *Id.* (alteration in original).

²⁵ Richard Henry Lee was one of the more influential voices in the Bill of Rights debate. He is most famous for his *Letters of a Federal Farmer*, which are the source of many of the proposals that later became the substance of the Bill of Rights and are considered a leading commentary on the meaning of the Bill of Rights. See HALBROOK, *supra* note 13, at 70.

²⁶ *Id.* at 71 (quoting R.H. Lee, *Letters of a Federal Farmer (1787-88)*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 305-06 (1888)).

²⁷ *Id.*

²⁸ Kates, *supra* note 1, at 216.

²⁹ See, e.g., HALBROOK, *supra* note 13, at 72 (quoting CHARLESTON STATE GAZETTE, Sept. 8, 1788).

No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state Such are a well regulated militia,

Samuel Adams, who stated that “[t]he Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, or suffering others to invade them.”³⁰

If one considers the function of the National Guard in modern America, it seems a fantastic proposition that these so-called “militia” organizations would ever perform the intended functions of a popular militia. It is quite conceivable that the National Guard could serve as a defensive force in the event of an invasion by a foreign army, and these units already assist in crime control by helping to maintain a modicum of order during times of riot, disaster, or extreme hardship. However, most would balk at the notion of the National Guard fulfilling the most important task of a popular militia, i.e., to provide a check on an oppressive government. Although the National Guard is not a federal entity, if called upon to offer armed resistance to the federal government, the members of this “select militia” would undoubtedly hesitate to do so, with many of its members likely siding with the federal government out of a sense of duty as a soldier. In time of revolution, its divided loyalties would severely hinder its effectiveness as the champion of a free people. The maintenance and regulation of the popular militia, as envisioned by the Framers, has fallen by the wayside over the past two centuries as the American populace has become more prosperous and less afraid of tyranny. But be that as it may, certainly the National Guard as we know it today could not be what the Framers intended when they used the term “militia,”³¹ and by no means can the existence of such units serve as a justification to deny individual citizens the right to private ownership of firearms.

3. *Power to “the People”*

One of the most glaring inconsistencies in the states’ rights argument is illustrated by the very distinct choice of terms between the two clauses of the amendment. The opening, subordinate clause speaks of “the security of a free State,”³² which clearly is a reference to the several states. The independent clause, however, speaks of “the right of the

composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.

³⁰ *Id.* at 62 (quoting III SAMUEL ADAMS, WRITINGS 213 (1906)).

³¹ For a related discussion of the role of the National Guard, see Reynolds, *supra* note 7, at 475-78.

³² U.S. CONST. amend. II (emphasis added).

people to keep and bear Arms.”³³ Again, just as we defer to the Framers’ choice of terminology when we construe the Constitution as a whole, we must likewise give them credit for having drafted the Second Amendment with equal care. If the right to gun ownership does not belong to the people, but rather to the states, it seems illogical, or at the very least confusing, to use language that assigns to the people a right intended to belong to the states. While the argument may continue by stating that the term refers to “the people”³⁴ in their collective sense as constituents of the states, subsequent interpretation of the term in Bill of Rights jurisprudence severely undermines this position.

Don B. Kates, Jr., in his extensive analysis of the Second Amendment,³⁵ brings to our attention “another, even more embarrassing problem for the exclusively state[s] right[s] interpretation.”³⁶ Specifically, the proponents of this interpretation, and in particular the American Civil Liberties Union,³⁷ appear to be very selective and inconsistent with their interpretation of “the people.” They unequivocally state that the term as it appears throughout the Bill of Rights refers to individual citizens, with the sole exception of the Second Amendment.³⁸ “To accept such an interpretation requires the anomalous assumption that the Framers ill-advisedly used the phrase ‘right of the people’ to describe what was being guaranteed when what they actually meant was ‘right of the states’ Cumulatively, [these incongruities] present a truly grotesque reading of the Bill of Rights.”³⁹

The Supreme Court, in *United States v. Verdugo-Urquidez*,⁴⁰ in holding that Bill of Rights protections do not extend to non-citizens outside the borders of the United States, clarified the intended definition of the term. “The people” as it appears in the Second Amendment, and indeed throughout the Bill of Rights, was clearly intended by the Framers to function as a term of art.⁴¹ According to the Court, a consistent

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ See Kates, *supra* note 1.

³⁶ *Id.* at 218.

³⁷ “That bastion of individual rights, the American Civil Liberties Union — a member organization of the National Coalition to Ban Handguns — emphatically denies that the [S]econd [A]mendment has anything to do with individuals.” *Id.* at 207

³⁸ See *id.* at 218.

³⁹ *Id.*

⁴⁰ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁴¹ See *id.* at 265 (“Contrary to the suggestion of *amici curiae* that the

interpretation was intended throughout the Bill of Rights.⁴² Therefore, the only logical conclusion that can be drawn is that if the Bill of Rights generally protects the rights of individual citizens, the Second Amendment specifically protects an individual right.⁴³

B. The Historical Origins of the Second Amendment

The notion that the right to keep and bear arms is individual in nature takes on additional force when one considers what the Framers understood to be the militia's purpose. This analysis will begin with an examination of the English militia tradition that was later adopted by the colonists, and a look at how this tradition was applied by the colonists during their fight for independence. Last will be a consideration of the statements of the Framers as they debated the need for a constitutional amendment to protect the right to private ownership of arms.

1. The English Tradition

In 1670, the English King Charles II passed a bill prohibiting all commoners from owning private arms,⁴⁴ which led to widespread popular discontent and heated debate in Parliament.⁴⁵ Andrew Fletcher, a participant in the English debate, zealously advocated private ownership of arms as necessary to the continued liberty of free men:

The possession of arms is the distinction between a freeman and a slave

[H]e who thinks he is his own master, and has anything he may call his own, ought to have arms to defend himself and what he possesses, or else he lives precariously and at discretion. And though for a while those who have the sword in their power abstain from doing him injury; yet, by degrees, he will be awed into submission to every arbitrary command. Our ancestors, by being always armed, and

Framers used this phrase 'simply to avoid [an] awkward rhetorical redundancy,' 'the people' seems to have been a term of art employed in select parts of the Constitution.") (citation omitted).

⁴² See *id.*

⁴³ For a similar analysis of the Court's reasoning in *United States v. Verdugo-Urquidez*, see also Inge Anna Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 485 nn.136-37.

⁴⁴ See HALBROOK, *supra* note 13, at 43.

⁴⁵ See *id.* at 44-48.

frequently in action maintained their liberty against encroachments of their own princes.⁴⁶

Fletcher saw the vulnerability of an unarmed populace to state tyranny, noting that “he that is armed, is always, master of the purse of him that is unarmed.”⁴⁷

The debate resulted in the adoption of the English Bill of Rights in 1689, which included as one of its provisions the right of “the subjects of England”⁴⁸ to carry arms for the purpose of resisting tyranny, but the right was not limited to use in militias.⁴⁹ The courts, by acquitting those whose only offense was the possession of a firearm, affirmed the right as a liberty allowed by the common law both before and after the enactment of the Bill.⁵⁰ It was during this very period in history that English settlers were establishing the colonies. They accepted this definition of their rights⁵¹ and carried this tradition with them to the New World. It was in this vein that the debates were conducted a century later when the United States adopted its own Bill of Rights.

2. *The American Militia Experience*

The English tradition was put into practice in the 1770s, as the colonists took up arms and organized into militias in preparation to meet the ever-growing threat posed by the standing English army. In every case, the militia was composed of private citizens, each bearing a privately owned weapon.⁵² These actions were perfectly consistent with the common understanding that only an armed citizenry could hope to impose a check on a tyrannical government and its standing army.⁵³ As it was then understood, a well regulated militia was “the body of the

⁴⁶ *Id.* at 47.

⁴⁷ *Id.* (quoting A. FLETCHER, POLITICAL WORKS 6, 7 (1749)).

⁴⁸ *Id.* at 54 (quoting I BLACKSTONE COMMENTARIES *143-44 (St. Geo. Tucker ed., 1803)). It is interesting to note that this is only a partial concession by the English crown. The right was not extended to the Irish and Scots due to their lack of support for English rule, and indeed legislation continued to be passed in the eighteenth century to disarm these populations. *See id.* Compare this to the ecumenical scope of the right described in the Second Amendment.

⁴⁹ *See id.* at 46.

⁵⁰ *See id.* at 49.

⁵¹ *See id.* at 54.

⁵² *See id.* at 60.

⁵³ *See Reynolds, supra* note 7, at 467.

people organizing themselves into independent companies, each member *furnishing and keeping his own firearms*, always ready to resist the standing army of a despotic state.”⁵⁴

As the crisis intensified, and the government made repeated attempts to disarm the colonists, the militia movement gradually spread and gained momentum.

With the spread of “the spirit of revolt” there was “a general rising of the people” — “our citizens rose in mass and armed themselves —

” In theory and in practice, the American Revolution had both as an objective and as an indispensable means the individual right to keep, bear, and use arms to check governmental oppression.⁵⁵

There is no clearer manifestation of the Framers’ attitude toward the role of the Militia and the private ownership of arms. Their adherence to the tradition they had inherited from England made it possible for them to wrest their independence from their oppressors, and was evidence of the philosophy upon which the government of the new nation would be founded.

3. *Debating the Bill of Rights*

There was a common understanding among the Framers, based on the English tradition, and in light of their own recent experiences, that the existence of an individual right to own arms was not really a subject for debate.⁵⁶ The necessity of gun ownership by a free citizenry was taken for granted.⁵⁷ Such an attitude can be attributed at least in part to a strong distrust of government among the Framers. For example, George Mason referred to government as the source of “the most arbitrary and despotic powers this day upon earth.”⁵⁸ Indeed, this notion had been reflected in the Declaration of Independence itself:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That

⁵⁴ HALBROOK, *supra* note 13, at 61 (emphasis added).

⁵⁵ *Id.* at 63-64.

⁵⁶ *See id.* at 65-75.

⁵⁷ *See id.*

⁵⁸ *Id.* at 61.

to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — *That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it.* ⁵⁹

Alexander Hamilton echoed this sentiment in *The Federalist*: “If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defence which is paramount to all positive forms of government” ⁶⁰ Thus, it was this right of the people to revolt against an oppressive government that made indispensable the right of the individual to own arms.

Federalists and Anti-Federalists alike agreed that the individual right to keep and bear arms was essential to the continued liberty of the newly established Republic.⁶¹ The only real point of contention was whether the Constitution should include a provision specifically stating the existence and inviolability of such a right.⁶² The Federalists believed that the mere fact that the people were armed would prevent encroachment by the government upon their liberties.⁶³ “The existence of an armed populace, superior in its forces even to a standing army, and not a paper bill of rights, would check despotism.”⁶⁴ Conversely, the Anti-Federalists believed that without an express articulation of the individual’s right, the creation of a select militia or standing army could result in a general disarmament and subsequent oppression of the populace.⁶⁵

In any event, there was widespread agreement that the right must be preserved. The debates even included calls for the adoption of a law that required every man to be armed.⁶⁶

⁵⁹ THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added). Note that the Framers expressed some suspicion even of the government they were soon to form, in stating that *any* form of government was subject to be abolished if it failed in its essential purpose, i.e., if it failed to secure the rights of its citizens.

⁶⁰ THE FEDERALIST No. 28 (Alexander Hamilton).

⁶¹ See *supra* notes 52-55 and accompanying text.

⁶² See HALBROOK, *supra* note 13, at 65-66.

⁶³ See *id.*

⁶⁴ *Id.* at 68.

⁶⁵ See *id.* at 69.

⁶⁶ For example, Patrick Henry noted that “[t]he great object is, that every man be armed. Everyone who is able may have a gun.” *Id.* at 74 (quoting 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 386 (1836)).

III. A SECOND LOOK AT THE CASE LAW

The Supreme Court has not often directly ruled on Second Amendment issues. Only once this century, in *United States v. Miller*,⁶⁷ has the Court addressed a constitutional challenge grounded in the Second Amendment. Since that decision, a number of lower courts have relied on it to justify an interpretation of the Second Amendment that coincides with that of the states' rights school.⁶⁸ The scholarship, noting that the opinion in *Miller* is ambiguous at best, raises serious questions as to whether this decision supports such an interpretation.⁶⁹

*United States v. Cruikshank*⁷⁰ is an earlier Supreme Court case dealing with Bill of Rights issues. Decided in 1875, it deals with the Second Amendment only indirectly. However, *Cruikshank* lends great weight to understanding the amendment's applicability. It also provides insight into how the Court viewed the nature of the rights protected by the Constitution, and should therefore be the initial focus of this analysis.

A. *United States v. Cruikshank*

This case arose during the Reconstruction period and involved a series of criminal charges against a number of defendants who had violated section 6 of the Enforcement Act of May 30, 1870.⁷¹ The Act

⁶⁷ *United States v. Miller*, 307 U.S. 174, 174 (1939) (holding that a sawed-off shotgun was not protected under the Second Amendment because it had no reasonable relationship to the preservation or efficiency of a well-regulated militia, and was not part of the ordinary military equipment or useful to the common defense). See *infra* notes 84-108 and accompanying text.

⁶⁸ See, e.g., *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942). *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

⁶⁹ For a detailed analysis of Second Amendment jurisprudence in the wake of the *Miller* decision, see Denning, *supra* note 3.

⁷⁰ *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁷¹ That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed five thousand

was intended to protect the constitutional rights of the recently freed black population by imposing criminal penalties on anyone who "banded" or "conspired" together for the purpose of infringing upon those rights.⁷² The Supreme Court, in determining whether this case was correctly brought under the Act, noted that

[t]o bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one *granted or secured by the Constitution or laws of the United States*. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress.⁷³

The clear implication was that the Court's decision would hinge on whether the hindered right found its origin or guarantee in federal or state law. The Court went on to discuss in detail the nature of our federal system, focusing on the distinctions between the sovereignties that exist at the state and federal levels.⁷⁴ It noted that "[t]he people of the United States resident within any State are subject to two governments: one State and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not."⁷⁵ Such a duality of citizenship requires duality of obedience to the laws of each respective sovereign, but likewise creates separate attributes of citizenship which allow the citizen to "demand protection from each [government] within its own jurisdiction."⁷⁶

In discussing the separate jurisdictions of the state and national governments, the *Cruikshank* Court emphasized that the government of the United States can only exercise the powers expressly delegated to it by the Constitution, and that all other powers are reserved to the people or the states. Moreover, "[n]o rights can be acquired under the Constitution or laws of the United States, except such as the Government of the

dollars, and the imprisonment not to exceed ten years, — and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140 (1870).

⁷² See *id.*

⁷³ *Cruikshank*, 92 U.S. at 549 (emphasis added).

⁷⁴ See *id.* at 549-51.

⁷⁵ *Id.* at 550.

⁷⁶ *Id.* at 551.

United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."⁷⁷

The Court held in favor of the defendants with respect to the Bill of Rights issues on the notion that the rights with which the defendants intended to interfere were not, in law or in fact, granted or secured by the Constitution or laws of the United States.⁷⁸ The Bill of Rights expressly prohibits federal government from infringing upon certain liberties, but is not otherwise a vehicle for granting or securing such rights.⁷⁹ Moreover, the Bill of Rights applies only to the national government, and not to the several states.⁸⁰ "For their protection in [the] enjoyment [of these rights], the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."⁸¹

The right to keep and bear arms is protected by the Bill of Rights against infringement by Congress. *Cruikshank* reveals that this right existed before the foundation of the federal government, not as a consequence thereof. Moreover, this right was not surrendered to the federal government. The Second Amendment is, of course, one segment of the Bill of Rights, and is thus encompassed by the *Cruikshank* holding. More specifically, the Second Amendment was the basis for two counts in the petitioner's claim and was directly addressed in the opinion.⁸² The

⁷⁷ *Id.*

⁷⁸ *See id.* at 550-52.

⁷⁹ *See id.* at 551.

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States

It was not, therefore, a right granted to the people by the Constitution. The Government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection.

Id.

⁸⁰ *See id.* at 552.

The First Amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the Government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State Governments in respect to their own citizens, but to operate upon the National Government alone.

Id.

⁸¹ *Id.*

⁸² *See id.* at 553.

Court stated that “[the right to bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”⁸³ In other words, these are natural rights; they were not arbitrarily created by the adoption of the Bill of Rights and are not subject to judicial revocation or to eradication by a repeal of the Second Amendment, contrary to what the states’ rights position implies.

After the Court decided that the Constitution was not the source of the right to keep and bear arms, but merely a means of preventing Congress from infringing upon that right, it was only a matter of time before the limits of the right would be tested. It was not until 1939 that the Supreme Court was called upon to decide just how far the right extended.

B. *United States v. Miller*⁸⁴

United States v. Miller, decided nearly six decades ago, left open the question of how the Supreme Court interprets the nature of the right protected by the Second Amendment. A number of lower court decisions have interpreted *Miller* to reject the existence of an individual right.⁸⁵ It is unclear, however, how those courts came to that conclusion, because the case’s holding actually seems to lean in the opposite direction.

Jack Miller and Frank Layton were indicted for unlawfully transporting an unregistered firearm in interstate commerce, in violation of the National Firearms Act.⁸⁶ The weapon in question was a double-barrel sawed-off shotgun with a barrel less than eighteen inches in length,

⁸³ *Id.* Professor Donald W. Dowd, in his recently published effort to discredit the individual rights argument, summarized the holding in *Cruikshank* by simply saying “the Court held that the Second Amendment created no right to keep or bear arms.” Donald W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 80 (1997). While this may be true, it tells only half the story and is misleading. Dowd ignores the Court’s pronouncement that the existence of the right to keep and bear arms predated the adoption of the Amendment, rather than being created thereby.

⁸⁴ *United States v. Miller*, 307 U.S. 174 (1939).

⁸⁵ For an analysis of these other decisions, see Denning, *supra* note 3, at 972-76.

⁸⁶ 26 U.S.C. § 1132 *et seq.* (1934) (recodified in 1954 as 26 U.S.C. § 5801 *et seq.*).

ownership of which was prohibited by the Act.⁸⁷ The defendants challenged the indictment on the ground that it offended the Second Amendment's prohibition against infringing on the right to keep and bear arms.⁸⁸ The district court agreed and quashed the indictment, but the Supreme Court reversed on direct appeal.⁸⁹

The Court's holding focused on the lack of evidence to show any "reasonable relationship [of the shotgun] to the preservation or efficiency of a well regulated militia."⁹⁰ The Court wrote that it could not "say that the Second Amendment guarantees the right to keep and bear such an instrument [the sawed-off shotgun],"⁹¹ because "it [was] not within judicial notice that this weapon [was] any part of the ordinary military equipment or that its use could [have contributed] to the common defense."⁹² In support of its holding, the Court then launched into a detailed historical analysis of the purpose and composition of the militia, as well as of a number of state provisions for the establishment thereof.⁹³ The Court raised a number of interesting points in its analysis that strongly undermine any interpretation of this decision as a rejection of the individual right to own firearms. In formulating their interpretation, states' rights proponents apparently rely on one particular paragraph within the opinion, which states:

The Constitution as originally adopted granted to the Congress power — "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia" With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.⁹⁴

Once again, however, reliance on this statement to support a states' rights interpretation is misplaced, because it assumes a "National Guard" definition of the militia, and further fails to account for several essential factors.

⁸⁷ See *id.* § 1132(a); *Miller*, 307 U.S. at 175.

⁸⁸ See *Miller*, 307 U.S. at 176.

⁸⁹ See *id.* at 177.

⁹⁰ *Id.* at 178.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See *id.* at 180-82.

⁹⁴ *Id.* at 178.

The first failing of the states' rights interpretation is that it completely discounts the remainder of the opinion, which repeatedly cites historical provisions requiring individual members of the militia to privately own the firearms they were to use to perform their military duties. For example, the Court detailed laws of the states of Massachusetts,⁹⁵ New York,⁹⁶ and Virginia⁹⁷ that plainly required members of the militia to appear for muster bearing their own firearms.⁹⁸ It seems illogical to require private ownership of firearms, while at once denying the individual the right to such ownership. In other words, if the militia is to be armed, the individual must first be armed.⁹⁹ Note that the purpose ascribed to the enactment of the Second Amendment was "to assure the continuation and render possible the effectiveness of such forces."¹⁰⁰ Again, if there is no individual right to own firearms, it follows that the general populace ought to be disarmed. This, however, clearly defeats the intention to draw on the common citizenry to form the militia. The only way to "assure the continuation and render possible the effectiveness" of the militia is to provide for an armed citizenry.¹⁰¹

⁹⁵ See *id.* at 180 ("That every non-commissioned officer and private soldier of the said militia shall equip himself, and be constantly provided with a good fire arm, etc.") (quoting General Court of Massachusetts, January Session 1784) (emphasis added)).

⁹⁶ See *id.* at 181 ("That every Citizen so enrolled [in the militia] and notified, shall, within three Months thereafter, provide himself, at his own Expense, with a good Musket or Firelock") (quoting New York Legislature, an Act passed April 4, 1786) (emphasis added)).

⁹⁷ See *id.* at 181-82 ("Every officer and soldier shall appear at his respective muster-field on the day appointed . . . armed, equipped, and accoutred And every of the said officers, non-commissioned officers, and privates, shall constantly keep the aforesaid arms . . . ready to be produced whenever called for by his commanding officer.") (quoting General Assembly of Virginia, October, 1785 (12 Hening's Statutes)).

⁹⁸ See *id.* at 179-80 ("In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and . . . cooperate in the work of defence. . . . A year later [1632] it was ordered that any single man who had not furnished himself with arms might be put out to service . . .") (quoting HERBERT L. OSGOOD, *THE AMERICAN COLONIES IN THE 17TH CENTURY* (1930)).

⁹⁹ See *Kates*, *supra* note 1, at 217 ("The personally owned arms of the individual were the arms of the militia.").

¹⁰⁰ *Miller*, 307 U.S. at 178.

¹⁰¹ *Id.*

In addition to this oversight, there is a second serious flaw in the states' rights interpretation of *Miller*: a total disregard of the basis of the Court's ruling. The defendants' cause was not defeated because they lacked an individual right to own firearms.¹⁰² If such was the case, the Court, logically, would have relied upon that interpretation of the Second Amendment to dispose of the claim. However, the Court did not even remotely hint at such a notion. Rather, it assumed the existence of the basic right and examined the characteristics of the particular weapon to determine if it fell within the scope of the right. Thus the Court stated:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.¹⁰³

The defendants lost because the weapon for which they claimed constitutional protection was not sufficiently related to "the preservation or efficiency of a well regulated militia," nor was it "part of the ordinary military equipment," the use of which "could contribute to the common defense."¹⁰⁴ The sole reason the Court refused to extend Second Amendment protection to *Miller*'s sawed-off shotgun was that it was not a military-style weapon. There is a very clear implication in the opinion, ignored by states' rights advocates, that as long as there is sufficient evidence that a particular weapon is of the type normally associated with military use, it will come within the Second Amendment's protective power.¹⁰⁵

Let us summarize what can be gleaned from these two cases. First, *Cruikshank* clearly states that the individual liberties protected by the Bill of Rights are not dependent on that document for their existence, but rather are natural rights whose existence predates the founding of the government.¹⁰⁶ Second, *Miller* provides strong support to the position

¹⁰² See *id.* at 178-82.

¹⁰³ *Id.* at 178.

¹⁰⁴ *Id.*

¹⁰⁵ Certain large weapons, such as rocket launchers and cannons, would pass the *Miller* test but are nevertheless excluded from Second Amendment protection. See *infra* notes 124-38 and accompanying text for a discussion of the rationale underlying this limitation.

¹⁰⁶ See *supra* notes 71-83 and accompanying text.

that an individual's right to own firearms must be preserved in order to "assure the continuation and render possible the effectiveness" of the militia.¹⁰⁷ Absent an individual right to own firearms, the militia would, for all practical purposes, cease to exist. Moreover, the *Miller* Court laid out a test for extending Second Amendment protection to a particular weapon: whether it bears some reasonable relationship to the preservation and efficiency of a well regulated militia, is of the type normally found in the military equipment, and is useful for the common defense.¹⁰⁸ The focus of the analysis is on the nature of the weapon for which protection is claimed, not on the nature of the right.

IV A SECOND LOOK AT MODERN GUN CONTROL STATUTES

It is clear from this trek through grammar, history, and case interpretation that the Second Amendment was intended to protect an individual's right to keep and bear arms. As shown in the preceding sections, any analysis at more than a superficial level quickly undermines arguments to the contrary. To bring this discussion into sharper focus, however, and to make it relevant on more than a purely academic level, the remaining portion of this Note will consider how some modern gun control laws would stand up to Second Amendment challenges brought against a backdrop of this interpretation. This analysis will center on two controversial statutes enacted in recent years: the 1993 Brady Bill¹⁰⁹ and the ban on assault weapons that was included in the Public Safety and Recreational Firearms Use Protection Act.¹¹⁰

A. *The Brady Bill*

In 1993, Congress passed the Brady Handgun Violence Prevention Act,¹¹¹ more commonly known as the Brady Bill. The stated purpose

¹⁰⁷ See *supra* notes 84-105 and accompanying text.

¹⁰⁸ See *supra* notes 90-92 and accompanying text.

¹⁰⁹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922(s)-(t) (1995)). A portion of the Brady Bill was held unconstitutional recently in *Printz v. United States*, 117 S. Ct. 2365 (1997). For a brief discussion on the Supreme Court's holding, see *supra* note 10.

¹¹⁰ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (1994) (codified as amended at 18 U.S.C. § 922(v) (1995)).

¹¹¹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat.

of the measure was “[t]o provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.”¹¹² In general, the law requires prospective handgun purchasers to provide personal identity information¹¹³ and a statement of eligibility¹¹⁴ to the seller, who is in turn obligated to submit the information to the chief law enforcement officer¹¹⁵ of the place of residence of the prospective purchaser.¹¹⁶ The chief law enforcement officer must make a reasonable effort to ascertain within five business days whether receipt or possession by the purchaser would be in violation of the law.¹¹⁷ Only if the check of the purchaser’s background yields a “clean” report can the transfer of the firearm be completed.¹¹⁸

This raises the question of whether this statute would withstand a Second Amendment challenge as a valid exercise of Congress’s regulatory authority, or whether it imposes an unlawful infringement on the individual’s right to keep and bear arms. Fairly simple analysis leads to the conclusion that the Brady Bill does not frustrate the Second Amendment with regard to ownership of individual firearms, and indeed may even be considered to enhance its purposes. While the federal government, due to the limitations of federalism, can no longer require the states to perform these checks, most states have chosen to continue participating in the background check program on a voluntary basis.¹¹⁹

1536 (1993) (codified as amended at 18 U.S.C. § 922(s)-(t) (1995)).

¹¹² *Id.*, H.R. CONF. REP. No. 103-412, 103d Cong., 1st Sess. (1993).

¹¹³ 18 U.S.C. § 922(s)(3) requires the following information to be provided for the purpose of conducting a criminal background check: name, address, and date of birth on a valid identification document bearing a photograph of the transferee, and a description of the type of identification used.

¹¹⁴ Section 922(s)(1)(A)(i)(I) requires a statement that the purchaser is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; is not a fugitive from justice; is not an unlawful user of, or addicted to any controlled substance; is not mentally impaired; is not an illegal alien; and has not been dishonorably discharged from the armed forces.

¹¹⁵ Section 922(s)(8) defines “chief law enforcement officer” as “the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.”

¹¹⁶ *See* 18 U.S.C. § 922(s)(1)(A)(i)(IV).

¹¹⁷ *See id.* § 922(s)(2).

¹¹⁸ *See id.* § 922(s)(1)(A)(ii)(II).

¹¹⁹ *See supra* note 10.

First, the right to own arms is not infringed by this statute. The imposition of a five-day waiting period may delay the gun purchase, but it would not, in itself, prevent it. The end result, despite the arguments of those who oppose the measure, is that those who pass the criminal background check will not be denied the right to purchase a firearm under this statute. But what, for example, of those who are denied permission to buy a handgun because of a criminal record or drug addiction?

It would appear at first glance that the right of such persons to firearm ownership was being violated, but a challenge by such an individual would likely fail because the Framers, in protecting the right to bear arms, intended more than just the preservation of the citizen militia. Another clearly stated purpose for individual gun ownership was the usefulness of private arms for law enforcement and crime control. Glenn Reynolds and other adherents to the Standard Model:

stress that the right to keep and bear arms was seen as serving two purposes. First, it allowed individuals to defend themselves from outlaws of all kinds — not only ordinary criminals, but also soldiers and government officials who exceeded their authority, for in the legal and philosophical framework of the time no distinction was made between the two.¹²⁰

It is also important to note that in eighteenth-century America, no police forces existed as we know them today.¹²¹ Moreover, the courts have repeatedly held that the function of the police is to deter crime in general, but not to protect individuals.¹²²

Given this emphasis on the right (or possibly the duty) of the individual to keep arms to protect himself and others against criminals, it is perfectly consistent with the intent of the Framers to pass laws to keep firearms out of the possession of criminals. Indeed, according to Kates:

[T]he concept of a right to arms was inextricably and multifariously tied to that of the “virtuous citizen.” One implication of this emphasis

¹²⁰ Reynolds, *supra* note 7, at 467; *see also* Larish, *supra* note 43, at 481 (“The framers were heirs to an Anglo-Norman legal tradition which required free men to keep arms to defend the realm and suppress crime.”).

¹²¹ *See* Larish, *supra* note 43, at 487-88.

¹²² *See, e.g., id.* at 487 (citing *Bowers v DeVito*, 686 F.2d 616 (7th Cir. 1982)).

on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.¹²³

In short, the Brady Bill, because it is intended not to interfere with the individual's right to keep and bear arms, but to prevent arming criminals, is not in conflict with the spirit of the Second Amendment and thus would withstand a constitutional challenge under an individual rights interpretation of the amendment.

*B. The Assault Weapons Ban*¹²⁴

In determining the validity of the assault weapons ban, it is necessary to return to the analysis of *United States v. Miller*.¹²⁵ *Miller* stands for the proposition that whether ownership of a particular firearm is protected under the Second Amendment is to be determined based on its relation to the preservation of the militia, whether it is part of the standard military equipment, and whether it is useful to the common defense.¹²⁶ Since assault weapons by their very nature are military weapons, they are precisely the type of weapons that the Second Amendment was intended to protect, so that militia members would have them available whenever the need should arise. For example, the Colt AR-15, which is not included on the list of weapons exempted from the assault weapons ban,¹²⁷ is the commercial equivalent of the M-16 series assault rifle, which is currently the basic weapon used throughout the United States armed forces. If the M-16 is suitable for military or militia use, then certainly the AR-15 is, also. The AR-15 clearly passes the *Miller* test based on its functional characteristics, and therefore its possession by private citizens should be deemed protected by the Second Amendment.

The position of the National Rifle Association, that the right to keep and bear arms protects the hunter, the collector, and the competitive shooter, is contrary to what the Framers intended.¹²⁸ Hunting rifles and

¹²³ Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986).

¹²⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1996 (codified as amended at 18 U.S.C. § 922 (1995)).

¹²⁵ See *supra* notes 84-108 and accompanying text.

¹²⁶ See *supra* notes 90-92 and accompanying text.

¹²⁷ See 18 U.S.C. § 922(v)(1).

¹²⁸ See generally David B. Kopel & Christopher C. Little, *Communitarians*,

match pistols are not the type of arms with which a militia could reasonably expect to offer meaningful resistance to a standing army. In other words, these types of firearms fail the *Miller* test, because they are not a part of the standard military equipment, useful for the common defense, nor do they bear any reasonable relationship to the preservation and efficiency of the militia. A militia, to be effective in its intended role, must be equipped at a level at least approaching that of its opponent. The regular armed forces are typically armed with assault rifles and automatic weapons, and it makes little sense to expect the militia to stand against a force in relation to which it is woefully underequipped. This is analogous to an expectation that the rebellious colonists of the 1770s turn out with sabers and spears to face the muskets of the British.¹²⁹ The assault weapons ban is therefore unconstitutional to the extent that it proscribes ownership of weapons that bear a reasonable relationship to the preservation and efficiency of the militia, which are part of the standard military equipment, and which are useful for the common defense.

This raises the counterargument that if *Miller* is carried to its logical extreme, it should extend constitutional protection to all types of military weapons, including rocket launchers, heavy-barrel machine guns, artillery pieces, etc. Certainly the Framers could not have intended that private citizens be allowed to own such weapons. While there seems to be some merit to this argument, there actually is very little basis for such concerns. It is quite unlikely that someone asserting the right to own a flamethrower based on the holding in *Miller* would find much support in the Supreme Court. The Court would use the clear implications of *Miller* to defeat that claim. The Court cited several examples of early militia statutes that specified the type of arms the citizen-soldiers were expected to bring to muster.¹³⁰ The equipment described included "a 'good fixed musket a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match;'"¹³¹ "'a good Musket or Firelock, a sufficient Bayonet and Belt, a Pouch with a Box therein to contain not less than Twenty-four Cartridges;'"¹³² and "'a good, clean musket a cartridge box a good knapsack and canteen'"¹³³ In other

Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition, 56 MD. L. REV. 438 (1997).

¹²⁹ See Kopel & Little, *supra* note 128, at 520-22.

¹³⁰ See *United States v. Miller*, 307 U.S. 174, 180-82 (1939).

¹³¹ *Id.* at 180 (quoting OSGOOD, *supra* note 98).

¹³² *Id.* at 181 (quoting New York Legislature, an Act passed April 4, 1786).

¹³³ *Id.* (quoting General Assembly of Virginia, October, 1785 (12 Henning's Statutes)).

words, these statutes clearly imply that the "arms" to be kept and borne by the members of the militia were those typically carried by the average foot soldier in a standing army. Based on this limited construction of the term "arms," it seems unlikely that the Supreme Court would ever extend the holding in *Miller* to encompass heavy weapons or weapons of mass destruction.¹³⁴

Don B. Kates also expressed concern that a reading of *Miller* that focuses solely on the military nature of a weapon would lead to absurd results.¹³⁵ Such a reading, without further qualification, would justify private ownership of tanks and rocket launchers. He resolves this problem by reformulating the *Miller* test¹³⁶ in light of subsequent case law to produce a three-part test that considers the whole intent of the Framers in adopting the Second Amendment. Kates' test is intended to compensate for "*Miller's* conceptually flawed concentration on the amendment's militia purpose, to the exclusion of its other objectives."¹³⁷ The test suggested by Kates' interpretation of post-*Miller* decisions would require a weapon to "provably be (1) 'of the kind in common use' among law-abiding people today; (2) useful and appropriate not just for military purposes, but also for law enforcement and individual self-defense, and (3) lineally descended from the kinds of weaponry known to the Founders."¹³⁸ Applying this more detailed and focused test, weapons like howitzers and flamethrowers are found to be excluded from the protection of the Second Amendment.

CONCLUSION

While the analysis in this Note may not find much support or sympathy among advocates of the states' rights interpretation, it is undeniable that there is a wealth of evidence available to support the conclusion that the Second Amendment protects an individual right to firearms ownership. From statements made by the Framers during their debates, from the historical context in which they made their decision, and from the way they chose to exercise private arms ownership during their struggle for independence, it is clear that this is the intended result.

¹³⁴ For additional discussion and analysis of what kind of weapons are protected by the Second Amendment, see Reynolds, *supra* note 7, at 478-80.

¹³⁵ See Kates, *supra* note 1, at 249 n.192.

¹³⁶ See *supra* notes 90-93 and accompanying text.

¹³⁷ Kates, *supra* note 1, at 259.

¹³⁸ *Id.*

Likewise, the National Rifle Association and like-minded gun ownership advocates may be uncomfortable with the idea that the individual rights interpretation of the Second Amendment — the interpretation they favor — gives full justification to the Brady Bill¹³⁹ and does not support the NRA's traditional position regarding ownership of guns used for hunting.¹⁴⁰

If the individual rights interpretation were unequivocally adopted by the Supreme Court, gun control advocates would undoubtedly question the wisdom of declaring the assault weapons ban unconstitutional. While the fear of having assault weapons on the streets is justifiable, and the tales of innocent victims who have been killed or maimed by heavily armed criminals is worthy of sympathy, a different way must be found to tackle this problem. Thugs and gang members should not have access to highly lethal, military-style firearms, as even the Framers would agree,¹⁴¹ but the assault weapons ban is not the right answer. To disregard the Framers' clear intent on such a fundamental right would undermine the legitimacy of the Constitution as a whole, and would pave the way for "creative interpretation" of its other provisions, including the other basic protections afforded by the Bill of Rights. Moreover, in this age of growing distrust of our mammoth federal government, this would be a dangerous step toward effectively disarming the general militia by depriving it of weapons that would offer a small measure of parity with the forces that it would, at least in theory, be expected to oppose. The idea of an armed revolution in this country may seem farfetched, but nevertheless it is a contingency for which the Framers, in their wisdom, saw fit to plan. While today it may seem worth the cost to provide a quick solution to our nation's crime woes by circumventing these protections, in the final analysis we the people will find that the price will be higher than we are willing to pay.

¹³⁹ See *supra* notes 111-23 and accompanying text.

¹⁴⁰ See text accompanying *supra* note 126.

¹⁴¹ See *supra* notes 103-05 and accompanying text.